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Supreme Court, U.S.
FILED
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No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, L.L.P.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF BELLSOUTH CORPORATION, SBC COMMUNICATIONS INC., AND QWEST COMMUNICATIONS INTERNATIONAL INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address (1) whether allegations of deficiencies in an incumbent telecommunications carrier's assistance to competing carriers state a claim under the antitrust laws, and (2) whether antitrust litigation over routine performance disputes between carriers would conflict with and undermine the remedial framework of the Telecommunications Act of 1996.

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INTEREST OF THE AMICI CURIAE

Amici BellSouth Corporation, SBC Communications Inc., and Qwest Communications International Inc. are incumbent local exchange carriers ("ILECs") in their respective regions. Amici have entered into thousands of interconnection and resale agreements with competing local exchange carriers ("CLECs") pursuant to the Telecommunications Act of 1996 ("1996 Act").

Because the parties to these agreements are competitors, disputes frequently arise between them over a host of technical details—ranging from the terms of equipment collocation to the price, quality, and speed of unbundling network elements and processing customer orders. Most of these disputes are resolved informally or, where necessary, before the state commissions that oversee relations between local telecommunications carriers. Emboldened by the decision below and lured by the prospect of treble damages, CLECs and consumers have filed numerous antitrust suits over the same issues. Amici agree with petitioner that the scope of the antitrust laws should not be expanded to encompass carrier performance issues and that antitrust adjudication of such issues is incompatible with the remedial framework prescribed by Congress in the 1996 Act.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

By ignoring established limits on the reach of the antitrust laws, the Second Circuit has opened the door to

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

unprecedented and burdensome antitrust litigation in the federal courts. This Court's precedents bar antitrust claims based on routine performance disputes between contracting parties and recognize that even monopolists have no antitrust duty to assist their competitors except in narrow circumstances not present here. Where, as here, the performance disputes are grounded in duties imposed by regulatory laws, and a federal statute clearly assigns responsibility to expert agencies to define, adjust, and remedy violations of new duties specially crafted for a single industry, there is even less occasion for the involvement of antitrust courts in these disputes.

Respondent's allegation that Verizon sometimes failed to process orders of AT&T and other CLECs "in a timely manner" (Am. Cmplt. ¶ 21) does not support an antitrust claim. The antitrust laws do not require Verizon to assist its rivals and are not concerned with such run-of-the-mill performance disputes. As the Seventh Circuit held in *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the antitrust laws may not be invoked to generate a supplementary, common-law body of network sharing obligations and affirmative assistance to rivals. Accord *Cavalier Telephone LLC* v. *Verizon Virginia, Inc.*, No. 02-1337, slip op. at 18 (4th Cir. May 20, 2003). The regulatory issues raised by respondent fit precisely into the remedial framework created by Congress in the 1996 Act.

The unprecedented regulatory regime created by Congress in the 1996 Act requires an incumbent carrier to share its network and facilities with competitors to help them enter and gain market share in the local telephone business, affirmative assistance not required by the antitrust laws. The sharing obligations prescribed by the Act would be unthinkable as antitrust duties imposed generally on American industry. To implement these new

extraordinary duties, the Act prescribes an elaborate system of compulsory negotiation and arbitration, with full enforcement by state and federal administrators. That remedial framework cannot be reconciled with the holding of the court below that alleged shortfalls in performing these new duties—even if already addressed pursuant to the administrative scheme of the 1996 Act—may give rise to lawsuits under the antitrust laws.

The district court properly recognized that respondent's allegations failed to state an antitrust claim. In contrast, the Second Circuit has radically extended the scope of federal antitrust litigation by broadly sanctioning monopolization suits under the "essential facilities" doctrine, by adopting an unwarranted extension of this Court's narrow "duty to deal" decisions, and by reviving a discredited version of the monopoly leveraging doctrine. Nothing in the 1996 Act suggests that Congress ever intended to have the Act's novel and far-reaching duties serve as the predicate for antitrust liability. To the contrary, Congress expressly provided that the Act's newly articulated administrative standards would not "modify" or otherwise extend the federal antitrust laws. See *infra* pp. 28-29.

Within the 1996 Act's comprehensive framework, carriers have negotiated thousands of interconnection agreements specifying their rights and obligations, many of which require alternative dispute resolution and specify sanctions for breach. The decision below renders all this for naught. Any dissatisfied CLEC or consumer may take performance disputes to court and demand treble damages, even if the directly affected carriers have resolved their differences to their complete satisfaction, as AT&T and Verizon did here. The practical result is that lay juries will be invited to second-guess expert agencies over complex regulatory policy issues, generating conflicting standards

and imposing duplicative damage awards for violations already remedied (as here, by a $10 million award to AT&T and other CLECs and a $3 million award to the government).

These questions were correctly resolved by the Seventh Circuit in *Goldwasser*, 222 F.3d at 395, an analogous case in which telephone consumers alleged "undue delays" by an ILEC in providing network access to its competitors. The *Goldwasser* opinion, authored by Judge Diane Wood, an antitrust scholar and former antitrust enforcement official at the Department of Justice, sensibly evaluates the intersection between antitrust and telecommunications law: the "affirmative duties to help one's competitors" imposed by the 1996 Act "do not exist under the unadorned antitrust laws." 222 F.3d at 399-400. And the Fourth Circuit recently reached the identical conclusion, noting that "if a company such as Verizon * * * were asked to share its office space and to rent its telephone lines and other facilities to a competitor when it was not already in the business of renting office space, lines, or facilities, it could have legally refused the request to expand into such a business without violating § 2 of the Sherman Act." *Cavalier*, slip op. at 18.

To "equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws," would be illogical. *Goldwasser*, 222 F.3d at 400. Moreover, Congress "entrusted supervision" of interconnection duties to expert regulatory agencies and "created a system of negotiated agreements through which this would be accomplished." *Id.* at 399-400. As a practical matter, the court explained, the 1996 Act's procedures are not "compatible" with antitrust resolution of performance claims: "The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be

brushed aside by any unsatisfied party with the simple act of filing an antitrust action," and "[c]ourt orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the § 252 agreements." *Id.* at 400-401.

The principles articulated by Judge Wood apply directly here. As the Solicitor General stated in his brief supporting the petition (at 8), "[t]he Second Circuit's decision is erroneous" because it "dramatically expands antitrust liability for failure to assist rivals." Dissenting from a similarly erroneous decision by the Eleventh Circuit, Judges Tjoflat, Anderson, and Birch explained that permitting such "forced-access" under the antitrust laws represents "bad policy [and] undermines Congress's regulatory scheme." *Covad Communications Co.* v. *BellSouth Corp.*, 314 F.3d 1282, 1286 (11th Cir. 2002). This Court should adopt the views of the Seventh Circuit, the Fourth Circuit, the Solicitor General, and the dissenting judges in *Covad* and reverse the decision below.

ARGUMENT

I. THE COURT BELOW DISREGARDED ESTABLISHED LIMITS ON THE SCOPE OF THE ANTITRUST LAWS.

The Second Circuit erred as a matter of law when it reinstated respondent's Section 2 claim. Respondent alleged no more than a breach of performance duties set forth in the interconnection agreement executed by Verizon and AT&T pursuant to the 1996 Act. The antitrust laws generally do not require firms to assist rivals at all, much less impose performance standards on such assistance. The court speculated that respondent *might* be able to show that Verizon's conduct amounted to an unlawful refusal to deal (under the so-called "essential

facilities" doctrine) or unlawful monopoly leveraging. Neither theory was articulated in respondent's complaint, and neither theory, even if valid, would apply to the provisioning issues raised by respondent.

A. Antitrust Law Does Not Govern Routine Performance Disputes Between Contracting Competitors.

Respondent's allegations that Verizon failed to fill CLEC orders "in a timely manner" and failed "to inform CLECs of the status of their customers' orders" (Am. Cmplt. ¶21) do not state a claim for unlawful monopolization but at most suggest a breach of contract. Verizon had no *antitrust* duty to meet AT&T's preferred timetable.

An ILEC's obligations to process CLEC orders derive solely from its interconnection agreements (and ILECs enter into those agreements solely because the 1996 Act mandates that they do so). Verizon's interconnection agreement with respondent's carrier, AT&T, was replete with performance standards and penalties and specified ADR procedures as the "exclusive remedy" for any complaints about contractual performance. Pet. App. 5a. Purchasers commonly demand faster and better service, but "[i]t is not an antitrust purpose to regulate ordinary business contracts." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶782m, at 282 (2d ed. 2002) (citing cases). Allowing such contract disputes to be bootstrapped into antitrust claims would overwhelm the courts and inflict a pointless waste of private and judicial resources. As Judge Tjoflat warned, "I cannot think of a situation [in] which an ILEC would be liable in breach and yet a creative plaintiff's lawyer could not also allege that the breach was made with an eye toward * * * preserving the

ILEC's position in the relevant market." *Covad*, 314 F.3d at 1290 n.17.

Even if there were something "unfair" about Verizon's alleged treatment of CLEC orders (see Am. Cmplt. ¶21), "business behavior that is improper for various reasons" is not the proper focus of "treble-damages antitrust cases." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 137 (1998). The Sherman Act "does not purport to afford remedies for all torts." *Hunt* v. *Crumboch*, 325 U.S. 821, 825-826 (1945) (affirming dismissal of antitrust suit). Antitrust law does not police "unfair competition." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). Conduct that is "punishable under more common state remedies, including contract and tort remedies[,] does not require the powerful prohibition of the antitrust laws." *Southern Pines Chrysler-Plymouth* v. *Chrysler Corp.*, 826 F.2d 1360, 1363 (4th Cir. 1987). In short, allegations of garden-variety deficiencies in performance of interconnection agreement duties do not state an antitrust claim.

B. An ILEC's Failure To Give Costly Affirmative Assistance To Rivals In The Manner They Prefer Is Not A "Refusal To Deal."

As this Court has recognized, the general rule under antitrust law is that firms, including purported monopolists, have no duty to cooperate or share their resources with competitors. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985); see 3A Areeda & Hovenkamp, ANTITRUST LAW ¶773a, at 196 (there is no "general duty to share one's resources"). Antitrust law encourages firms to compete against, not assist, competitors. The rationale is that vigorous competition, not compelled sharing of resources, yields output and prices that optimally benefit consumers. See

Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984). Thus, even a monopolist has "no duty to extend a helping hand to new entrants." *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.).

An ILEC's affirmative duties to share its resources with rivals derive not from antitrust law but from the 1996 Act and the interconnection agreements it mandates. The Act requires ILECs to provide rivals with access to their network elements and services on uniquely favorable terms. 47 U.S.C. § 251(c)(2) and (3). These "special duties" designed to "jump-start the development of competitive local markets" "go well beyond anything the antitrust laws would mandate on their own." *Goldwasser*, 222 F.3d at 399-400; see also H.R. Conf. Rep. No. 104-458, at 123 (1996) ("Conf. Rep.") (these "new obligations flow only from the statute"). The court below improperly conflated the jump-starting duties imposed by the 1996 Act with antitrust duties. See *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932) (affirming dismissal of antitrust claims that alleged "violations of [statutory] provisions or are so interrelated with such charges as to be in effect a component part of them").

This Court has recognized a narrow "refusal to deal" exception to the general antitrust rule against forced cooperation. *Aspen Skiing*, 472 U.S. at 603. But this Court has never employed the "refusal to deal" rationale to require a defendant to act irrationally, that is, to sacrifice its own business interests in order to aid a rival. A monopolist's refusal to deal may be unlawful under the antitrust laws only if it is "predatory," *i.e.*, not based on "efficiency," and has no purpose other than harm to competition. *Aspen Skiing*, 472 U.S. at 602-603.

In *Aspen Skiing*, 472 U.S. at 608, the defendant "elected to forgo * * * short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." Similarly, in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 148 (1951), the defendant newspaper refused to accept fully-paid advertisements from companies that submitted ads to a rival, thereby sacrificing its short-term economic interest in maximizing its advertising revenues. The defendant in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 378 (1973), refused to transmit power to the requesting cities on the same profitable terms on which it regularly transmitted such power to others "solely to prevent" competitors from gaining market share. See also *Otter Tail*, 331 F. Supp. 54, 57 (D. Minn. 1971) (Otter Tail "regularly engages in the business of wheeling power"), aff'd in relevant part, 410 U.S. 366 (1973). In each of these cases, the refusal to sell a facility or service to a competitor that the defendant was profitably selling to others raised a presumption of predatory conduct. That presumption was heightened where the defendant long had provided the item that it later refused to provide, as in *Aspen Skiing*, 472 U.S. at 603, and *Lorain Journal*, 342 U.S. at 146-148.

Verizon's alleged failure to provide the speed and quality of access demanded by AT&T and other CLECS cannot be deemed irrational. The 1996 Act, as implemented by the FCC, requires ILECs "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467, 489 (2002). ILECs must "share their own facilities" with competitors and supply them with packages of elements and services at a price lower than the ILEC would obtain if it sold that package directly to a retail

customer. *Id.* at 476. No rational business would ever supply vital elements and services to competitors at near-confiscatory rates. It would be irrational—indeed, commercially suicidal—for a firm charging a retail customer $100 a month to provide subsidized inputs that enable rivals to offer that customer the same service at $60 a month.

While the 1996 Act requires such business practices (within regulatory limits), antitrust law does not. See *Verizon Communications*, 535 U.S. at 528 (competitor access to network facilities was "something brand new under the 1996 Act"); *United States* v. *AT&T*, 604 F. Supp. 316, 324 (D.D.C. 1985) (AT&T divestiture decree did not seek "artificial creation of competition by enabling [rival] interexchange carriers to share AT&T's interexchange capabilities and facilities"). Until now, no antitrust court ever has required a firm to give up profitable retail sales in order to make less profitable (much less near-confiscatory) sales to rivals. In *Aspen Skiing*, for example, this Court did not require the defendant to provide access to its ski mountain *at a discount* so that the plaintiff could undercut the defendant's prices and divert its customers. And the decree in *Otter Tail* required the defendant to transmit power at the same "compensatory" rates that were voluntarily offered to others. See 410 U.S. at 375.

Respondent has not alleged—nor *can* it allege—how it would make economic sense for Verizon to assist rivals in taking away Verizon's customers. Thus, even if the complaint had alleged an actual refusal to deal, and not merely deficiencies in performance, it would not state a monopolization claim.

Respondent has not alleged an actual refusal to deal within the scope of the Court's decisions. In *Aspen Skiing*, 472 U.S. at 610, the defendant absolutely refused to

continue its profitable joint marketing venture with the plaintiff. Similarly, the unlawful conduct in *Lorain Journal*, 342 U.S. at 150, was an attempt to completely exclude a radio station from access to vital advertising and thereby cause "the complete destruction and elimination" of the station. In *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 458 (1992), ISOs were totally excluded from the market for fixing Kodak copiers. In *Otter Tail*, 410 U.S. at 371, the defendant "simply refused" to transport any power to municipalities competing with it at the retail level.[2]

By contrast, pursuant to the 1996 Act, AT&T and other CLECs are *using facilities and services provided by the ILECs* to actively compete with Verizon and other ILECs. The CLECs' own websites proclaim their success in using their access to ILEC networks to compete for local telecommunications customers. AT&T declared in March 2003 that "[m]ore than 2.5 million households and half a million small businesses are already enjoying the benefits of competition through AT&T Local Service." http://www.att.com/news/item/0,1847,11519,00.html. MCI publicly advertises "the industry's first truly any-distance, all-inclusive offering combining local and nationwide long distance calling." http://global.mci.com/about/company. And Covad states that its services are "currently available in 96 of the country's top Metropolitan Statistical Areas." http://www.covad.com/companyinfo. All of these service offerings are made possible by the network access that

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[2] As one court of appeals has described *Otter Tail*, it was "an extreme case" in which the defendant "baldly refused to deal" rather than "merely impose[d] some handicap on potential competitors." *Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 536, 543 (9th Cir. 1991).

Verizon and other ILECs provide to CLECs like AT&T, MCI and Covad pursuant to the 1996 Act. In short, there has been no refusal to deal.[3]

C. Respondent's Allegations Are Not Actionable Under An "Essential Facilities" Theory.

The court below relied on an "essential facilities" variant of this Court's narrow refusal to deal exception to the general rule against forced access. This Court has "never adopted" the "essential facilities" doctrine, *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring), which has been widely and sharply criticized. Judge Posner has condemned the essential facilities doctrine as "having nothing to do with the purposes of antitrust law." *Blue Cross & Blue Shield* v. *Marshfield Clinic*, 65 F.3d 1406, 1412-1413 (7th Cir. 1995). Other "scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access." *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 427 n.4 (D.C. Cir. 2002).

That skepticism is well-founded. Permitting competitors to take a free ride on a purported monopolist's

[3] It is conceivable that, in some contexts, the terms on which a firm offers to deal may be so onerous that the offer itself is tantamount to an actual refusal to deal. But that is not this case. Indeed, any such claim would be foreclosed by the 1996 Act itself. For, if a CLEC deems the terms and conditions on which an ILEC offers access to its network unacceptable, the CLEC has a right to arbitrate those terms and conditions and to seek federal court review of any adverse arbitral determination. Likewise, if an ILEC fails to perform in accordance with its interconnection agreement obligations, the CLEC may invoke state commission jurisdiction to compel such performance.

investment reduces their incentives to build their *own* facilities and thus is more likely to stunt than promote competition. As Judge Tjoflat put it, antitrust law does not permit "horizontal competitors that find it financially inconvenient to build their own physical plant [to] simply tap the resources of the incumbent/monopolist or else sue for treble damages." *Covad*, 314 F.3d at 1288. For that reason, leading commentators urge that "the essential facility doctrine is both harmful and unnecessary and should be abandoned." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 771c, at 173. Similarly, the purported monopolist's incentives to invest in facilities will be reduced if it is required to share those facilities. The reliance of the court below on this discredited theory offers this Court an opportunity to reject it once and for all.

At a minimum, the risk of undermining the bedrock purpose of the antitrust laws—spurring investment and innovation so as to lower producer costs and align consumer prices and costs—counsels against expanding this problematic and controversial doctrine. See *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1357-1358 (Fed. Cir. 1999) ("an unwarranted extension" of essential facilities doctrine risks harm to competition); Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989). Nor is there any need to do so. As the FCC has explained, the 1996 Act "plainly imposes on incumbent LECs a broader duty to deal with competitors than does the essential facilities doctrine." See *Third Report and Order*, 15 FCC Rcd. 3696, ¶ 60 (1999).

The decision below stretches the essential facilities doctrine beyond recognition. Even those cases accepting the essential facilities doctrine have not applied it when the plaintiff has access to the facility and complains only about the terms of such access. See *Alaska Airlines, Inc.* v.

United Airlines, Inc., 948 F.2d 536, 543-545 (9th Cir. 1991) (rejecting essential facilities claim where defendants "never refused any of the plaintiffs access" to their computer reservation systems and plaintiffs complained only about the terms); *Ideal Dairy Farms* v. *John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (business that utilized defendant's premises but complained about terms "was not denied use [of] facilities"); *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir. 1991) (where defendant offered to ship competitor's goods on defendant's track, essential facilities doctrine did not require defendant to lease track to enable rival to earn higher profit). Respondent has not alleged a denial of essential facilities but only a failure to perform as quickly as demanded by Verizon's competitors.

Respondent and its amici have relied heavily on *MCI* v. *AT&T*, 708 F.2d 1081 (7th Cir. 1983), which held that AT&T had unlawfully monopolized based on the essential facilities doctrine. In that case, AT&T "refused to interconnect MCI with the local distribution facilities of Bell operating companies" (*id.* at 1132), "never challenged the assertion that it had denied MCI access to the local distribution network" (*id.* at 1133), and "dismantled all the interconnections" it had previously provided (*id.* at 1134). Respondent alleges no remotely comparable denial of access by Verizon.

Furthermore, AT&T denied MCI a private line service that AT&T voluntarily sold others pursuant to tariff. As the FCC explained in an order quoted by the district court and relied on by the court of appeals, "Bell presently has arrangements * * * with numerous independent telephone companies for access to its local distribution facilities for the purpose of enabling Long Lines and the independent telephone companies to provide FX and CCSA services."

MCI v. *AT&T*, 462 F. Supp. 1072, 1092 (N.D. Ill. 1978), quoting *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 426 (1974); see also *MCI*, 708 F.2d at 1097. What is more, AT&T admitted that it denied MCI the required access *solely* to harm a disfavored competitor: "With respect to its arrangements with the independent telephone companies for FX and CCSA services, Bell states that the independent companies do not operate on parallel routes or duplicate Bell's facilities and are therefore not competitors." 46 F.C.C.2d at 428.

In contrast, competitors have been *favored* by Verizon and other ILECs. Due to the mandates of the 1996 Act and its implementing regulations, competitors obtain unbundled network elements that are unavailable to noncompetitors and entire services at prices far below what retail customers pay. In particular, competitors have access to the Unbundled Network Element Platform ("UNE-P"), which enables competitors to resell the incumbent's telephone service at cost-based UNE rates rather than at the retail-based resale rates specified by Congress.[4] The essential facilities doctrine has never required, and should not now be expanded to require, a firm to sell services to rivals at prices substantially below what it charges others for those same services. As the Seventh Circuit held in *Goldwasser*, dismissing claims like those of respondent is fully consistent with that court's prior ruling in *MCI*.

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[4] See *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953, ¶ 193 (1999).

Furthermore, the essential facilities theory has never been applied where a statute *guaranteed* access to the very facilities that plaintiff claims to be essential and gave regulators responsibility and power to enforce the access rights in question. Under the 1996 Act, the CLECs themselves hold the keys to resolving *any* access problem. Unlike the situation in *Otter Tail*, where the Federal Power Commission had "no authority" to order a utility to transmit electric power over its transmission lines to requesting municipalities (410 U.S. at 375), the state commissions are fully authorized to resolve such issues. See Part II, *infra*. In other words, ILECs *cannot* refuse CLECs access to loops or other facilities without the approval of the designated regulators. Under section 251(c), an ILEC *must* negotiate in good faith with CLECs to provide access to loops and other facilities, and should the ILEC refuse to provide such access (or refuse to provide it on terms the CLEC believes reasonable) the CLEC can force the ILEC into arbitration before the state commission under section 251(b). See 47 U.S.C. § 251. Should a CLEC believe that an ILEC is not providing the access mandated by a state commission pursuant to the 1996 Act, it can seek relief from the state commission, or seek revocation of an ILEC's long distance authorization or other sanctions from the FCC. See 47 U.S.C. § 271(d)(6). These regulatory remedies assure that neither valid interconnection requests nor access to any "essential facilities" will be denied. In other words, the "control" element of an essential facilities claim cannot as a matter of law be satisfied in this context.

AT&T took full advantage of the 1996 Act's regulatory machinery to resolve its grievances with Verizon, obtaining a consent decree and millions of dollars in damages. Pet. App. 5a. Respondent's antitrust complaint raises the very same issues resolved by the consent decree

and alleges injury that is entirely derivative of the injury previously asserted by AT&T. The heavy artillery of antitrust is not required to compel the very same affirmative assistance that Congress directed state and federal agencies to oversee. In industries subject to extensive regulation, "relief for arbitrary refusals to deal should be left to common law remedies [or] legislation. * * * It is well within the province of the courts in determining the scope of § 2 to leave such matters to them." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 770e, at 169. Because the 1996 Act already conveys highly favorable access to the ILECs' facilities, there is no independent role for the essential facilities doctrine to play.

Extending the essential facilities doctrine to inter-carrier performance issues would violate the antitrust principle that courts should not assume the role of industry regulators. See Hovenkamp, *The Monopolization Offense*, 61 Ohio St. L.J. 1035, 1044 (2000) ("antitrust courts are not public utility agencies"). Prohibiting a particular form of anticompetitive conduct (such as price-fixing or a horizontal boycott) is quite different from imposing an affirmative obligation to deal with rivals. As Justice Breyer has observed, "[e]ven the simplest kind of compelled sharing * * * means that someone must oversee the terms and conditions of that sharing." *Iowa Utils. Bd.*, 525 U.S. at 428. Requiring a defendant "to deal with outsiders requires some mechanism for supervising and adjusting the price and other terms." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 787c, at 305. Must the defendant share with one rival, with several, with all? What prices may the defendant charge? How much of its physical plant must it turn over? How much sharing is optimal? Must the defendant build new facilities or retrofit existing facilities? To what degree must it unbundle

complex network facilities? These are but some of the questions that an antitrust court (and jury) would have to address.

These concerns are underscored by the technicality and complexity of the access and provisioning issues raised by respondent. See R. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 937 (2001) ("communications technology [is] much more difficult [than] the average body of scientific or engineering knowledge that lay judges and jurors are asked to absorb"). As the D.C. Circuit has observed, "there are many different types of loops, including two-wire loops, four-wire loops, analog loops, digital loops, fiber loops, and copper loops," as well as "countless uses to which loops can be put, including residential service, business service, voice service, data service, alarm service, and so on." *AT&T* v. *FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000). Determining the practical need for and feasibility of sharing inputs in an industry with daily-innovations, the adequacy of computerized ordering systems serving multiple carriers, and workable solutions to provisioning delays is not within the province of the courts. Judge Tjoflat properly concluded that trial courts should not serve as "quasi-regulatory agencies [to] oversee sharing between rivals." *Covad*, 314 F.3d at 1288. The "intensely practical difficulties" of resolving disputes in this area are best left to the expert regulators. *Verizon Communications*, 535 U.S. at 502.

Permitting CLECs to demand better provisioning via the essential facilities doctrine also would require ILECs to cede, expand, or alter their existing facilities to accommodate such demands. Neither the essential facilities doctrine nor any other antitrust principle requires a firm to fundamentally alter its business, develop costly new systems, deploy new facilities, or abandon existing

facilities "to satisfy a would-be sharer." 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 773e, at 210 (citing cases). As the Fourth Circuit recently noted, the essential facilities doctrine does not compel a firm "to get into a business it was not traditionally in simply to respond favorably to a new competitor's demand for use of its facilities." *Cavalier*, slip op. at 17.

Requiring overburdened federal courts to police the highly technical terms of interconnection performance would reimpose the "government by consent decree" that Congress rejected in the 1996 Act. See 110 Stat. at 143, § 601(a); Conf. Rep. at 198-201. As described by then Assistant Attorney General Charles Rule, head of the Antitrust Division, the "choice of the Department and decree court as substitutes" for "state regulators" was a "big mistake" because regulating inter-carrier performance required "technical expertise, regulatory experience, and a set of administrative procedures." *Antitrust and Bottleneck Monopolies: The Lessons of the AT&T Decree*, reprinted in TELEMATICS, Dec. 1988, at 16. Congress put an end to this "big mistake." As described in Part II, authorizing multiple antitrust courts and juries to oversee inter-carrier relationships would make a dead letter of the 1996 legislation.

For all these reasons, the court below had no ground for reinstating respondent's Section 2 claim based on the "essential facilities" doctrine. As many courts have recognized, futile essential facilities claims should be dismissed at the pleading stage.[5]

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[5] In addition to *Goldwasser*, see, *e.g.*, *Midwest Gas Servs.* v. *Indiana Gas Co.*, 317 F.3d 703, 714 (7th Cir. 2003) ; *International Audiotext Network, Inc.* v. *AT&T*, 62 F.3d 69, 72 (2d Cir. 1995); *Caribbean Broad. Sys.* v. *Cable & Wireless PLC*, 148 F.3d 1080

D. Respondent's Allegations Are Not Actionable Under A "Monopoly Leveraging" Theory.

The Second Circuit's second ground for authorizing respondent's antitrust claim – its monopoly leveraging theory – also conflicts with established limits on antitrust law. That theory would make unlawful a firm's use of its market power in one market to obtain a "competitive advantage" in a second market, even when there is no prospect of achieving a monopoly in the second market. Such a theory cannot be reconciled with this Court's holding in *Spectrum Sports* v. *McQuillan*, 506 U.S. 447, 459 (1993), that unilateral conduct violates Section 2 "only when it actually monopolizes or dangerously threatens to do so." Based on *Spectrum Sports*, conduct that leads to a "competitive advantage" in the second market does not violate Section 2 because it represents neither actual monopolization nor the dangerous threat required for attempted monopolization. See generally Joseph Kattan, *The Decline of the Monopoly Leveraging Doctrine*, 9-Fall ANTITRUST 41 (1994).

Far from barring efforts to obtain a competitive advantage in other markets, antitrust law encourages "dominant firms to engage in vigorous competition." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). Firms may seemingly obtain an "unfair" advantage through innovations and efficiencies that benefit

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(D.C. Cir. 1998); *TV Communications Network, Inc.* v. *Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992); *Wojcieszek* v. *New England Tel. & Tel. Co.*, 977 F. Supp. 527, 534 (D. Mass. 1997); *Norcen Energy Resource Ltd.* v. *Pacific Gas & Elec. Co.*, 1994 WL 519461 (N.D. Cal. Sept. 19, 1994); *Futurevision Cable Sys.* v. *Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D. Miss. 1992), aff'd, 986 F.2d 1418 (5th Cir. 1993).

consumers. But the antitrust laws "do not create a federal law of unfair competition." *Brooke Group*, 509 U.S. at 225. This Court accordingly should reject the Second Circuit's monopoly leveraging rationale.

Furthermore, even when accepted, the monopoly leveraging doctrine has never been applied to the wholesale and retail sides of a *single business*. The implications of such an extension of the monopoly leveraging doctrine are startling. It would preclude an upstream monopolist from selling its product exclusively through its own distribution system based on the potential adverse impact on independent distributors reselling the product to consumers. But it is virtually always lawful under the antitrust laws for a firm to sell what it makes, even if it does so exclusively and disadvantages unintegrated rivals. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997); 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 764c. The cost savings from such vertical integration benefit consumers. See 3A Areeda & Hovenkamp, *supra*, ¶¶ 757-758. This Court therefore should reject any extension of monopoly leveraging theory to restrict an integrated firm's freedom to sell its services directly to retail customers.

Finally, as with the essential facilities doctrine, administering the monopoly leveraging doctrine in this context would create an administrative nightmare for the federal courts. Courts are poorly equipped to evaluate whether a manufacturer must supply product to independent resellers and other competitors and, if so, how much, at what price, and on what terms. See 3A Areeda & Hovenkamp, ANTITRUST LAW ¶ 774e, at 224 ("courts are not well equipped to deal with [terms of forced access]"). The technical complexities of telecommunications

products and markets underscores the impropriety of assigning such a task to antitrust courts and lay juries.

II. PERMITTING ANTITRUST LITIGATION OVER ROUTINE PERFORMANCE DISPUTES BETWEEN CARRIERS WOULD CONFLICT WITH AND UNDERMINE THE REMEDIAL REGIME ESTABLISHED BY CONGRESS.

If the antitrust laws were stretched to supervise interconnection performance in the manner advocated by respondent, that would undermine the regulatory framework established by Congress in the 1996 Act.

A. This Court's Precedents Require A Careful Evaluation Of The Impact Of Sporadic Antitrust Adjudication On This Unique Regulatory Scheme.

This Court consistently has sought to protect the integrity of the regulatory process and to avoid the conflict and confusion that may result from permitting parallel antitrust and regulatory challenges to the same conduct. In these types of cases, the Court analyzes the regulatory scheme and gauges the practical consequences of antitrust adjudication on effective administrative supervision. See Sullivan & Grimes, THE LAW OF ANTITRUST § 14.5, at 746 (2000) (listing cases). An important factor in that analysis is the Court's longstanding recognition that expert agencies often "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to resolve intra-industry disputes. *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952).

For example, in *Pan Am. World Airways, Inc.* v. *United States*, 371 U.S. 296, 305 (1963), the Court found that some practices regulated by a federal agency were subject

to antitrust review but not those "basic in this regulatory scheme." In *Hughes Tool* v. *TWA*, 409 U.S. 363, 385 & n.14, 387 (1973), the Court upheld dismissal of an antitrust claim because subjecting conduct that is "under the surveillance" of an expert agency to "the sanctions of the antitrust laws" was inappropriate. The Court reaffirmed this approach in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 684-686 (1975), explaining that deference to an "oversight" agency is appropriate to "take advantage of its special expertise" and avoid "any conflict arising between the regulatory scheme and the antitrust laws." And in *United States* v. *NASD*, 422 U.S. 694, 734-735 (1975), the Court affirmed dismissal of an antitrust claim because, "[i]n this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that [the industry] would be subjected to duplicative and inconsistent standards." Accord *National Gerimedical Hosp.* v. *Blue Cross*, 452 U.S. 378, 393 n.18 (1981).

As shown below, this careful, case-by-case approach to applying the antitrust laws with due consideration for their relationship with federal remedial statutes is especially warranted here. In 1996, Congress imposed upon ILECs unprecedented duties to cooperate with their competitors – duties never contemplated by, and in many ways foreign to, the antitrust laws. The expert agencies charged by Congress with responsibility for enforcing 1996 Act requirements, unlike antitrust courts, must do so in the broader context of a regulatory scheme that compels them to consider diverse areas of telecommunications regulatory policy—including, for example, requirements that carriers meet service quality commitments to retail customers, provide service as carriers of last resort to end users who cannot be economically served, and support the national defense. This comprehensive regulatory framework must

be considered when determining the propriety of antitrust resolution of particular types of disputes.

B. Antitrust Adjudication Of Disputes Arising Under Interconnection Agreements Would Create Intolerable Conflicts With The Act's Remedial Regime.

In the 1996 Act, Congress entrusted supervision of interconnection duties to state and federal administrative bodies and directed that disputes arising under interconnection agreements be addressed through the Act's dispute resolution process. See 47 U.S.C. §§ 251-252; *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002). State commissions have actively exercised their authority to supervise local carrier relationships and to enforce performance obligations under the 1996 Act and interconnection agreements. In addition, virtually all state commissions have formulated performance plans, standards, and penalties to test ILECs' performance against literally thousands of performance measures and to assist in the identification and resolution of any performance deficiencies.[6] The FCC's resolution of

[6] *E.g.*, *Order Concerning Performance Measurements and Enforcement Mechanisms*, 2002 WL 1448773 (N.C. Utils. Comm'n May 22, 2002); *Notice*, In re Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies, 2003 WL 1040595 (Fla. P.S.C. Feb. 28, 2003); *Order Amending Performance Assurance Plan*, 2003 WL 721469 (N.Y.P.S.C. Jan. 24, 2003); *Order*, In re Performance Measures for Telecommunications Interconnection, Unbundling and Resale, 2002 WL 32071549 (Ga. P.S.C. Dec. 17, 2002); *Order*, In the Matter of Qwest's Performance Assurance Plan, 2002 WL 31954217 (Minn. P.U.C. Nov. 26, 2002); *Final Opinion*, Re Performance Measures Remedies, 2002 WL 32063827 (Pa. P.U.C. Nov. 21, 2002); *Opinion*, Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems, 2002 WL 1899988 (Cal. P.U.C. June 27, 2002).

the ordering delay issue in this case shows that it actively exercises its authority in this area as well.[7]

In light of the remedial regime that Congress created to resolve interconnection disputes, "[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Pan Am.*, 371 U.S. at 309-310. Allowing antitrust lawsuits to proceed in tandem with the regulatory proceedings in this context would disrupt the elaborate administrative scheme that Congress delineated. Lay juries would be asked to second-guess expert agency decisions with respect to exceptionally complex and technical issues. Such an incoherent process inevitably would impose "duplicative and inconsistent standards" on the affected parties. *NASD*, 422 U.S. at 735; *Gordon*, 422 U.S. at 689. That AT&T already has raised and resolved through the regulatory process before the FCC the very issues raised by respondent underscores the seriousness of this conflict. If those same disputes also become subject to antitrust adjudication, the lure of treble damages will lead claimants to bypass the agencies designated to resolve them, and "the procedures and remedies specified by Congress for violations of the Telecommunications Act would become subservient to, indeed overrun by, the Sherman Act." *Cavalier*, slip op. at 21.

[7] The FCC has asserted "concurrent" authority to regulate and impose damages for a breach of interconnection duties. See *In the Matter of Core Communications, Inc.*, No. EB-01-MD-017, ¶¶ 13-17 (FCC rel. Apr. 20, 2003).

The 1996 Act procedures would be rendered incapable of resolving simple carrier-to-carrier disputes if CLECs or consumers are permitted to file claims based on identical disputes, engage in lengthy antitrust litigation, and years later obtain a jury verdict at odds with the administrative ruling. As Judge Tjoflat pointedly asked, "Why would a CLEC ever sue only in contract when it can jettison the regulatory scheme and sue for treble damages in federal court?" *Covad*, 314 F.3d at 1290. Under the Second Circuit's ruling, a party could file an antitrust suit "the day after" agency resolution of interconnection disputes, an absurd result. *Hughes Tool*, 409 U.S. at 388.[8] Congress cannot have intended to authorize such redundancy, which can only promote conflict and obstruct the 1996 Act's dispute resolution machinery.

The fact that Congress modeled the 1996 Act's administrative framework on collective bargaining confirms this conclusion. See *First Report and Order*, 11 FCC Rcd. 15499, 15577 n.292 (1996) (citing NLRB precedent to explain the 1996 Act's good-faith bargaining requirement). As in collective bargaining, CLECs have every opportunity to demand contractual protections in case an ILEC does not perform as promised. They may

[8] In fact, respondent filed this action immediately after the "exclusive remedy" specified in the Verizon-AT&T agreement produced a negotiated resolution of their interconnection dispute. It would be perverse for ILECs that have elected to settle intercarrier performance disputes through the appropriate regulatory processes to find that those settlements are meaningless, serving only as the opening salvo in protracted antitrust litigation. If the "settled" issues are litigated before antitrust courts and juries rather than expert commissions, an ILEC's incentive to settle will be significantly lessened, and the regulatory mechanisms designed to resolve this sort of dispute expeditiously will be bypassed.

seek mandatory penalties for unsatisfactory performance and demand arbitration if the ILEC does not agree to such provisions. See 47 U.S.C. § 252. Good-faith negotiations and contractual performance standards would be rendered meaningless if a party could seek treble antitrust damages whenever it became dissatisfied with the progress of negotiations or performance under resulting agreements. To prevent such a result, this Court long has held that antitrust litigation should not be permitted to disrupt good-faith bargaining governed by federal regulation. See *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 242 (1996); *Associated Gen. Contractors* v. *California Council of Carpenters*, 459 U.S. 519, 526-527 (1983). The same principle applies under the 1996 Act.

The Second Circuit denied that there was any risk of "conflic[t] with the regulatory framework" arising from an action for damages, as opposed to injunctive relief. Pet. App. 38a-39a. But it is well established that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); accord *Cipollone* v. *Liggett Group*, 505 U.S. 504, 521 (1992). Allowing consumers to bring treble damage class actions based on CLEC grievances over ILEC provisioning would have the same disruptive effect as a judicial injunction. The Second Circuit also suggested a two-track process through which CLECs could resort to regulatory relief while CLEC customers file antitrust suits. This impractical scheme would simply allow CLECs to use consumers as stalking horses and thereby exacerbate the conflict between antitrust adjudication and the regulatory regime.

As explained in the amicus brief filed by SBC, BellSouth, and USTA at the certiorari stage in this case (at

15-16 n.3), the foregoing concerns are confirmed by the extraordinary proliferation of class action litigation that has come in the wake of the decision below. A cottage industry is rapidly developing within the plaintiffs' bar devoted to monitoring disputes between ILECs and CLECs and racing into court with antitrust complaints that demand treble damages and attorneys' fees. In addition to undermining the regulatory process, these actions threaten unconstrained damage awards that will force costly settlements regardless of the merits of the claims and impose serious burdens on the courts.

These opportunistic suits are not driven by any downturn in competition. As early as 2000, the D.C. Circuit noted "the evidence of growing competition in the New York local telephone market." *AT&T* v. *FCC*, 220 F.3d at 633. In fact, CLECs now control 25% of the local telephone market in New York. FCC, *Local Telephone Competition: Status as of June 30, 2002*, Table 7 (Dec. 2002). Nationwide, the FCC's latest statistics show that the number of local telephone lines served by CLECs jumped from 8.2 million in December 1999 to 21.6 million in June 2002. *Id.* Table 1. Those same statistics show rapid growth in competition in those states that CLECs have chosen to target, such as Michigan, where CLEC market share grew from 3% in December 1999 to 18% in June 2002. This objective evidence of increased local exchange competition confirms that the existing scheme of regulation of ILECs' performance under interconnection agreements represents no threat to competition.

C. The Savings Clause Should Not Be Read To Undermine The Act's Remedial Scheme.

The court below relied on the antitrust savings clause in the 1996 Act, 110 Stat. 56, 143, § 601(b)(1), reprinted as note to 47 U.S.C. § 152, to authorize adjudication of

carrier performance disputes. But that provision only confirms that it was improper for the court to "modify" established limits on the scope of the antitrust laws. As demonstrated above, respondent is seeking an enormous "modification" of existing antitrust law by treating 1996 Act duties as if they were antitrust duties, contrary to the unambiguous prohibition in the savings clause against such a modification of antitrust law. See *Cavalier*, slip op. at 19.

The Second Circuit also relied on the Act's savings clause to undermine regulatory procedures established in that very statute. Yet this Court repeatedly has cautioned that savings clauses in regulatory statutes may not be construed to undermine the regulatory scheme. On that basis, dismissal of an antitrust claim was upheld in *Pan Am. World Airways*, notwithstanding the existence of a broadly worded savings clause. 371 U.S. at 310; *id.* at 321 (Brennan, J., dissenting); see also *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (refusing to "give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law"); *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998). As explained above, allowing antitrust suits over ordering delays and other performance issues would disrupt the 1996 Act's remedial scheme.

* * * * *

These are not issues that must await discovery and the compilation of a summary judgment record. See note 5 *supra*; 2 Areeda et al., ANTITRUST LAW ¶ 307c, at 68, 71 (2d ed. 2000) (claims of a duty to deal and monopoly leveraging present questions of legal "policy, not of fact"). Allowing these costly and burdensome cases to lumber forward through discovery and possibly to trial would conflict with this Court's admonition that courts should

dismiss deficient antitrust claims at the pleading stage rather than allow "a potentially massive factual controversy to proceed." *Associated Gen.*, 459 U.S. at 528 n.17. Because the antitrust laws do not extend to routine performance disputes between ILECs and CLECs, and because antitrust litigation over those disputes would conflict with and undermine the remedial framework of the 1996 Act, the court below should not have reinstated respondent's antitrust claims.

CONCLUSION

The decision of the Second Circuit should be reversed.

Respectfully submitted.

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MAY 2003